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MAKING LEGISLATORS LAW MAKERS

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THE PROBLEM

Representative Bodies. The discussion of the problems of legislation has usually centered around the forms of legislative bodies. The problems of bicameral legislatures, the cabinet system of responsible government, and questions of apportionment have been quite generally discussed. These discussions of form have obscured the consideration of the workings of legislative bodies in their effort to translate the will of the people into workable statutes. The breakdown of our legislative system has, however, finally forced upon our attention the necessity of a thorough-going examination of our entire scheme of representation and of the workings of legislative bodies.

The effort to improve legislation first centered about the question of making legislators truly representative of their constituents. In many states that problem has been solved by the adoption of the initiative, referendum and recall which have, to a large degree, made legislators look to their constituents for guidance in making laws. This new method of insuring responsibility is in wholesome contrast to the old method of checks and balances whereby the people attempted to protect themselves against legislative bodies by shackling all legislatures with restrictions that prevented them from doing things which ought to be done as well as things which ought not to be done.

The people of this country inherited a fear of government through their experience with governments imposed on them from without. They feared their own representatives and lest they should do some harm by arbitrary action, their methods of doing business were narrowly restricted. "It is against the enterprising ambition of this department (the legislative) that the people ought to indulge all their jealousy and exhaust all their precautions," said Madison. "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetu-

ous vortex.”¹ Throughout our history these fears thus expressed have found lodgment in the constitutions of our states and the effect has been disastrous upon the capacity and effectiveness of legislatures.

Having expelled the fear which has long been felt of the tyranny of legislative bodies, through the adoption of direct methods of action against legislators and the laws which they enact, it would seem that the time had come for a thorough examination to see that legislators who now have become, through the influence of popular control, more truly representative of the people, shall have the facilities for the performance of their function of law making. We have doubtless secured or are securing representative legislatures. Our present duty is to work for efficient legislatures.

Four distinct problems confront the legislator in his attempts at law making. First, he must express the will of the people. Second, he must express the intent of laws clearly. Third, he must keep within the constitutional limitations; and fourth, he must provide for enforcement.

Interpreting Popular Will. The purpose of the legislature being to translate the will of the people into laws requires on the part of the legislator that he give close attention to the economic and social conditions which inspire the people whom he represents to favor or oppose the passage of laws. He should not, of course, be entirely subservient to the views of his constituents because it is assumed that he may be able from greater knowledge and broader experience to interpret needs better than those to whom it has not been given to see the effects of the things which they propose in their broadest aspects.

There is not a very clearly established notion in this country as to the constituency to which the legislator is responsible. While it is accepted that a member of a legislature should represent the people of the whole state and approve acts which are for the benefit of the whole state, as a matter of fact, being responsible for his election to the people of his legislative district, he is compelled for political expediency to ignore the high standards of statesmanship which would set state benefits against local benefits, because he must ask his local people for their votes and his continuance in

¹*Federalist*, No. 48.

public life practically depends, not on how he serves the state, but on how he serves his local community.

As a practical proposition, therefore, it is doubtful whether we can have legislatures which will look at questions from the standpoint of broad benefits so long as the members are compelled to look for their election to voters whose views and vision are entirely local. The legislator who can lead his people to see the righteousness of his course in supporting state interests instead of local interests, is of course the ideal legislator. Few members in any state, or in Congress, have a state or national conception of their work and few have such qualities of leadership as are necessary to overcome the influence of local benefits or prejudices. The legislator who is capable of analyzing economic and social conditions and of harmonizing state and local interests is the true representative. We cannot have the full realization of the benefits of representative government without such men. But we cannot have any great number of such men until one of two conditions prevails—first, the education of the people to a recognition of the supremacy of state or national, over local needs or opinions, or second, a rearrangement of representation so that a part or all of the legislators will be elected on a general ticket covering the whole state.

Expressing Intent. Among the problems of law making none is so difficult as that which inheres in the use of language. The difficulty of expressing the intent of a difficult law in exact words is very great. A single word or a misplaced comma may change the entire meaning of a law. Moreover, every law must be framed not merely according to the present conditions but as John Stuart Mill says: "every provision requires to be framed with the most accurate and long-sighted perception of its effect on all other provisions and the law when made should be capable of fitting into a consistent whole."

Of the use of words, Cooley says:

The deficiencies of human language are such that if written instruments were always prepared carefully by persons skilled in the use of words we should still expect to find their meaning often drawn in question or at least to meet with difficulties in their practical application. But when draftsmen are careless or incompetent these difficulties are greatly increased and they multiply rapidly when the instruments are to be applied, not only to the subjects directly within the contemplation of those who formed them but also to a great variety of new

circumstances which could not have been anticipated but which must nevertheless be governed by the general rules which the instruments establish.

Justice Stephens of England emphasized the same point in a striking passage in which he said that he

was not accustomed to use language with that degree of precision which is essential to everyone who has ever had to draft acts of parliament which, although they may be easy to understand, people constantly try to misunderstand and in which, therefore, it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.

Any person who has had to frame even the simplest statutes where no other complications were present except the mere difficulty of expression of exact meaning, has had abundant proof of these statements. A change of the single word "or" to "and," which words in legislation are usually interchangeable, considerably weakened the Inheritance Tax Law of Indiana. The surreptitious change of the word "such" to the word "all" in enrolling a bill in the same state a few years ago, removed the teeth of an important law affecting railroads.

The California legislature had to be called in special session in 1911 to correct a single word in a constitutional amendment which had been passed. The Maine legislature of 1915 was also called in special session to correct a single word in a workmen's compensation act.

Experiences might be multiplied on this head all tending to prove the obvious facts that the most precise and far-sighted care must be taken to make any law effective.

Constitutional Limitations. The difficulties above mentioned confront the legislatures of all countries, but in addition there are supplementary difficulties in this country because the law must fit into and not exceed the provisions of the federal and state constitutions. The constitutions are the centripetal forces holding the law to certain limits which the centrifugal forces of progress always tend to exceed.

Four distinct matters must be considered in the state legislatures: First, is the power one which has been given to and exercised by congress? Second, is the power one which has been denied to the state by express terms of the federal constitution? Third, is the power one which has been denied to the legislature by the state

constitution? Fourth, has the bill been prepared and adopted in strict conformity to the rules laid down by the state constitution? Thus the inherent difficulties of correct expression are supplemented by the practical difficulties of conformity to state and federal constitutions and of enactment according to methods prescribed by the state constitutions. The bill drafter must know, not only the broad principles of constitutional law but he must be familiar with every detail of the state and federal constitutions.

Enforcement. Provisions for enforcement are no less important than the matters just mentioned. Enforcement requires attention to the economic and social basis, exact wording and constitutional limitations. Laws will not be enforced contrary to public sentiment; laws cannot be enforced which are uncertain in meaning; and laws contrary to constitutional provisions are null and void from the beginning. "Laws shall be expressed in plain language avoiding so far as possible the use of technical terms" declare some of the constitutions. Penal statutes are always strictly construed. Courts will not punish offenders under an uncertain statute.

Laws which are to be enforced by administrative officers are attended with peculiar difficulties. How to give the right measure of authority to administrative officials and how to secure government of laws and not of men without destroying efficiency are foremost problems in modern legislation. The attempt to prescribe exact details of administrative action by legislators ignorant of administrative law and practice, often destroys the efficiency of laws. Mill's strictures on legislative bodies are equally true today when he said that a popular assembly is not fitted "to administer or to dictate in detail to those who have the charge of administration. Even when honestly meant, the interference is almost always injurious. Every branch of public administration is a skilled business which has its own peculiar principles and traditional rules many of them not even known in any effectual way, except to those who have at some time had a hand in carrying on the business and some of them likely to be duly appreciated by persons not practically acquainted with the department."

THE MACHINERY OF LEGISLATION

Qualification of Members. The existing machinery of legislation is almost wholly inadequate to do the work which is required.

Representative government has not brought men of the greatest capacity into legislative halls. Legislators are universally elected from small districts. The influences surrounding them are too often local and provincial. Wide acquaintance with social and economic needs is uncommon.

Very few legislators have had experience fitting them for making laws. It is common in many states to find fully three-fourths of the members who are totally without legislative experience. A large percentage serve only one term. By the time they learn the first rudiments of legislation the session is over. Few members are familiar with the laws which they propose to amend or supplement. The statute book is so much Sanscrit to many. Yet these men amend old laws and pass new ones affecting the life, liberty and property of all the people of the state!

Qualifications of Employees. The lack of qualifications of the legislators themselves might be overcome by an efficient organization of clerical, legal and expert assistants. This has, however, not been very generally done in state legislatures. In almost every state the assistants are appointed solely on political considerations. It is a common practice to divide the patronage among the members of the dominant party—each member having one or more appointments. In consequence, legislatures are compelled to begin their work with crudely working machinery. Everyone, who has had anything to do with organizing forces of assistants, knows the difficulty of bringing together quickly a body of assistants who will work together. Under most favorable conditions the difficulty is extreme but under existing conditions in legislatures it becomes impossible. So, instead of being relieved of technical matters of legislation by a skilled body of assistants, burdens are added to the members. The usual legislative session is nearly over before the clerks and assistants actually learn their jobs.

Very little attention has been given to the higher grades of assistants. Legislatures seem to have been afraid of employing the man who knows thoroughly the work of legislation or the man of expert attainments in bill drafting or the constitutional adviser or the research man. The personnel of the legislative force seldom contains any assistants of this class.

Limitation of Sessions. In all but sixteen states, there is a limit to the length of sessions. This limit varies from forty to

ninety days. In most instances the limit was fixed years ago when the demands upon the legislature could probably be met during the period fixed. This is not the case, however, in any state at this time. The limitation of sessions assumes that the legislature is a necessary evil which must be curbed at every point and which must be got rid of just as quickly as possible. Such limitation fails to recognize that legislatures meet to consider and pass upon present needs. They ought to be free to spend as much or as little time as necessary to do their work efficiently.

Special and Local Legislation. Much of the valuable time of the members is spent in handling special and local acts about which very few of them can give any intelligent judgment. In the states where special and local acts are narrowly limited, the tendency to pass such acts by indirection is very great. The general statutes of the states are filled with exceptions which have been forced into the laws by local or special interests seeking advantages. At the same time, while it has not cured the ills of special legislation, the provision against special and local legislation adds immensely to the difficulties of keeping within the constitutional limitations.

THE REMEDY

The writer does not believe that there will be any decided improvement in the ability of legislators except as the whole mass of the people are improved by education. Such betterment, moreover, will be more than offset by the increased complexities of law making which each year adds. It is not to be expected that legislators will become expert law makers. It is out of the question that members will be able to investigate intricate subjects, examine legal technicalities, draft bills or pass upon details. That would imply a race of supermen. Such a body would not be representative of the people. So long, therefore, as we have representative government, we must expect the members of the legislature to be ordinary, intelligent men without expert knowledge. Indeed, true representation implies that all interests should be represented in the legislature. The legislature ought to be the forum where every class of our citizenship should have a hearing through representatives in sympathy with their ideas. Probably before we shall have such a legislature, some plan of proportional representation must be devised which will insure the representation

of minorities in proportion to their strength. By means of the initiative and referendum, legislative responsibility to the whole state is assured. By the recall, responsibility to their constituents is certain. If to these can be added such a scheme of organization as will relieve the legislators of the things which they are not fitted to do, and leave them the things to do which representative bodies should really do, there ought to be vast improvement in the quality of legislation.

Improved Organization. To enable the legislatures to do their work the first improvement must be in the organization of the assistants who are to do the detailed work. There must be some permanent, expert, non-partisan official, or officials, who makes of legislation a permanent business and who can bring to the representatives of the people an efficient kind of professional service. Legislators ought to be relieved of the details of law making so that they may be left free to decide upon general principles.

In any scheme of organization, attention needs to be directed to the committee work. This is the vital part of legislation. The legislatures justly rely upon their committees to sift matters referred to them and present back to the body suitable recommendations together with proper drafts of the bills favored. If the work of the committee has been done in ignorance or if the bills reported back have not had the attention which they should have received, the committee work is a failure. Committee work ought to be responsible work; thorough analysis of every bill should be made and every member should go on record in every action taken on the bill. Since the members of committees cannot give personal attention to all of the bills referred to them and since they are not qualified to frame statutes and pass upon their details, it follows that if any expert work is to be done by the committees, specially qualified assistants should be provided. Such assistants would serve the committees in the same way that the corporation lawyer or engineer serves a board of directors. Any committee which attempts to do its work with its own clumsy hands, will not give us the kind of legislation needed.

Legislative Information. A solid background of information is also imperative. Legislators ought to be guided by experience whenever experience will show them the way to success or point the way of failure. Every state may profit by the experience of

other states and foreign countries. There is nothing new under the sun, at least for all practical purposes, and the problem of efficient legislation is to utilize all the data of experience in formulating laws and deciding upon their enactment.

Until very recently nothing worth while had been done to gather the experience of states and countries and make it available for legislative guidance. In contradistinction to the failure to provide guides for legislation may be mentioned the extreme care and great effort extended in the gathering of judicial experience for the guidance of courts. Every supreme court has at its command every court decision rendered in this country and in English-speaking countries. Legal clerks are at its service to sift every case to the bottom to find out what interpretations have been put upon similar cases. The legislators have had no such efficient guides, although it is a far more difficult task to frame statutes than to interpret them. The legislative reference departments have made a good beginning in many states but their inadequate facilities do not make them compare favorably with the facilities for judicial interpretation. Vast amounts of information are being gathered by these departments. The light of experience is beginning to be thrown on law making but not until better methods are employed to translate intricate facts into material understandable by the legislators, will this agency solve the problem of legislative guidance.

Legislative Drafting. Closely related to legislative information is the subject of bill drafting. It is through the medium of a bill that the carefully collected information of the legislative reference bureau may be translated into concrete statements. Expert bill drafting is an absolute necessity in any plan of legislative reform. Members cannot draft bills and they ought not have that responsibility placed upon them. Nor should they as a body pass upon details.

It is impossible (said John Stuart Mill) that these conditions (accurate law making) should be in any degree fulfilled when laws are voted clause by clause in a miscellaneous assembly. The incongruity of such a mode of legislating would strike all minds were it not that our laws are already as to form and construction such a chaos that the confusion and contradiction seem incapable of being made greater by any addition to the mass.

What Mill would have thought of the utter confusion of the statute laws of American states can only be conjectured.

We Americans have made a huge joke of the expression that "ignorance of the law excuses no one" when we have allowed our laws to be in such a state of confusion that no one of ordinary discretion would assume to say what the law is on important subjects. An expert corps of draftsmen consisting of men of the highest legal attainments is a necessity which ought to strike intelligent minds forcibly. Why legislatures have failed to create agencies of this character is one of the mysteries unsolved. The best guess on the matter is that they have feared that it might take away the precious privilege of tinkering with the laws themselves. They have assumed that drafting is their function whereas it is not and could not be the function of a miscellaneous assembly. Only the highest grade of legal service should be employed if we are to redeem our laws from their present chaotic state.

Not less important than the drafting of bills is the matter of expert revision. Laws drafted with the greatest care and left to the tender mercies of succeeding legislatures are soon an intolerable mass of conflicting provisions. The drafting bureau ought, therefore, to become a revision commission which shall take up the laws subject by subject and after revising them into a state of consistency should be an adjunct of the legislature to which all future amendments must be referred in order that thereafter the law may be kept consistent. The scheme proposed by Mill for Parliament whereby a special commission was to be created to which should be referred every bill in order to make sure of its form and substance, would fit into the machinery of our state governments with great benefit. Under that scheme, the legislature would approve the principle of a bill and refer it to the commission with instructions to draft. The legislature would have no authority to change such a bill but would refer it back to the commission for any changes which were desired. How to get such a commission under the present extreme partisanship in American legislatures, is the practical problem confronting the states. Such a commission would necessarily be non-partisan. Ordinary lawyers would be of small value to do the work. Narrow technicians in the law would be fatal to the commission. Broad-minded lawyers who are not tied to formalism and who are thorough students of economic and social progress would be the ideal draftsmen. Such positions ought to rank in dignity with the judges of the supreme court.

The drafting departments of legislative reference bureaus may readily develop into this ideal. At present they are sometimes handicapped by unjust suspicions on the part of some legislators who seem to think they are usurping legislative functions.

Other Reforms. With the changes herein suggested some additional reforms must be effected or else the machinery will break down as the existing machinery has broken down. In the first place, time is the essence of careful legislation. Important laws hurried through the legislature in the closing days of a limited session are bound to be filled with defects and fraud. The time limits of legislatures must therefore be removed or greatly extended in order that legislatures may meet modern needs in deliberative fashion.

The burden of local and special legislation must also be taken off the backs of legislatures. Today the greater part of the time of legislators is taken up with the consideration of local and special bills. Such legislation cannot be successfully prohibited and ought not to be prohibited. There are many necessary local exceptions to general acts arising out of the differing conditions. We shall probably not successfully solve this problem until the restrictions placed in the constitutions upon local and special legislation are entirely removed and two conditions set up to relieve the situation—first, greater home rule for cities and counties; second, a local government board with power to make provisional orders subject to ratification by the legislature.

Since legislation is so intimately connected with administration, there must be established some direct connection whereby administrative experience may guide the legislatures in enacting laws which are to be administered or executed by administrative officials. Already there are movements to put the preparation of the budget estimates upon executive officials leaving the legislature free to reject but not increase. A responsible financial program is thereby worked out. Legislative draftsmen will necessarily be familiar with administration and an effective drafting bureau would eliminate many of the faults found at present. However, it will be necessary to make some more vital connection between the administrative division of the government and the legislative division in order to get responsive interaction between law making and law enforcement.

But above all and growing out of all of these considerations we need to recognize that the most important thing in making legislators law makers is to clearly establish the proper function of the legislative body and leave it to perform its legitimate functions. At present legislatures attempt too much. They try to do things which they cannot do well. They attempt too much detailed regulation and burden themselves with work which could be better done by properly chosen subordinate experts. Legislatures ought to be the controlling body and not attempt administration. Confined to this function, a legislature responsible to the people will lift itself out of the confusion and reestablish itself in the confidence of the people.